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No. -

IN THE

Supreme Court of the United States

October Term, 1990

RONALD L. DAVENPORT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion below is contrary to *Cheek v. United States*, 498 U.S. ____ (1991), by holding that person who mistakenly thought that their actions were lawful can be guilty of having a "purpose of evading the reporting requirements."

2. Whether the statutory "purpose of evading the reporting requirements" can be expanded by a court to apply to any "attempt to split up a cash hoard in such a way as to defeat the government's efforts to identify money launderers."

3. If the statutory language can be expanded to apply to any attempt "to defeat the government's efforts," whether such application of the statute is unconstitutionally vague as applied.

4. Whether uncharged other acts proven to a standard of "fishiness," instead of proven by a preponderance of the evidence, are sufficient for admission into evidence.

5. Whether the government can give a person warnings implying that his refusal to give possibly incriminating answers would not be used against him, and then in its case in chief at trial introduce in evidence as admissions of guilt the defendant's refusal to answer certain questions in the government interview.

6. Whether the admission of improper testimony is harmless beyond a reasonable doubt when the government highlighted the improper testimony during its closing argument, the jury during its deliberations specifically requested a transcript of the improper testimony, and the court of appeals opinion relied on the improper testimony.

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Opinion Below	1
Jurisdiction	2
Constitutional And Statutory Provisions	2
Statement Of The Case	2
Argument	3
1. The opinion below is contrary to *Cheek v. United States*, 498 U.S. ____ (1991) by holding that persons who mistakenly thought that their actions were lawful can be guilty of having a "purpose of evading the reporting requirements"	3
2. The opinion's application of the statute is violative of the statute, because the opinion interprets the statutory "purpose of evading the reporting requirements" to require only an attempt "to defeat the government's efforts to identify money launderers"	14
3. If the statutory language can be expanded to apply to any attempt "to defeat the government's efforts," such application of the statute is unconstitutionally vague as applied	16
4. Uncharged other acts proven to a standard of "fishiness," instead of proven by a preponderance of the evidence, are not admissible in evidence	17
5. When the government gives a person warnings implying that his refusal to give possibly incriminating answers would not be used against him, the government can not in its case in chief at	

trial introduce in evidence as admissions of guilt the defendant's refusal to answer certain questions in the governrnent interview..... 20

6. The admission of improper testimony is not harmless beyond a reasonable doubt when the government highlighted the improper testimony during its closing argument, the jury during its deliberations specifically requested a transcript of the improper testimony, and the court of appeals opinion relied on the improper testimony..... 26

Conclusion..... 28

TABLE OF AUTHORITIES

Page

Constitutional Provision:

United States Constitution, Fifth Amendment 2

Statutory Provisions:

Title 18, United States Code, Section 371 2

Title 18, United States Code, 3231 2

Title 28, United States Code, 1254(1) 2

Title 28, United States Code, 1291 2

Title 31, United States Code, Section 5313 ..... 2, 4

Title 31, United States Code, Section 5322 ..... 2, 3, 4, 10

Title 31, United States Code, Section 5324 ... 2, 3, 4, 7, 8, 10

Regulations:

Title 31, Code of Federal Regulations, Section 103.11(n) (7-1-89 Edition) 2, 5

Title 31, Code of Federal Regulations, Section 103.22 (7-1-86 Edition) 2, 4, 5

Title 31, Code of Federal Regulations, Section 103.22 (7-1-87) 2, 5

Decisions:

Arizona v. Fulminante, 499 U.S. ____ (1991) 27

California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974). 4

Cheek v. United States, 498 U.S. ____ (1991) 3, 9, 11, 12, 13, 14, 27, 28

City of Akron v. Akron Center for Reprod. Health, 462 U.S. 416 (1983) 17

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 16

Colautti v. Franklin, 439 U.S. 379 (1979) 16

Commissioner v. First Sec. Bank, 405 U.S. 394 (1972). 4

Conally v. General Construction Co., 269 U.S. 385 (1926) 16

Doyle v. Ohio, 426 U.S. 610 (1976) 21

Giaccio v. State of Pennsylvania, 382 U.S. 399 (1966) . 16

Greer v. Miller, 483 U.S. 756 (1987) 21, 23

Griffin v. California, 380 U.S. 609 (1965) 25

Huddleston v. United States, 485 U.S. 681 (1988) 18, 19

Jenkins v. Anderson, 447 U.S. 230 (1980) 24, 25, 26

Kolender v. Lawson, 461 U.S. 352 (1983) 17

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 16

Miranda v. Arizona, 384 U.S. 426 (1966) 20, 26

Morissette v. United States, 342 U.S. 246 (1952) 12

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 16

Smith v. Cadagin, 902 F.2d 553 (7th Cir. 1990) 26

Smith v. Goguen, 415 U.S. 566 (1974) 16

Thomas v. State of Indiana, 910 F.2d 1413 (7th Cir. 1990). 24

United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985). 6

United States v. Aversa, 762 F.Supp. 441 (D.N.H. 1991). 12

United States v. Caro, 637 F.2d 869 (2nd Cir. 1981) 24

United States v. Dashney, 937 F.2d 532 (1991) 12

United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991) 1, 3, 6, 7, 8, 13, 15, 16, 18, 19, 20, 25

United States v. DeGeratto, 876 F.2d 576 (7th Cir. 1989) 19, 20

United States v. Edwards, 885 F.2d 377 (7th Cir. 1989). 26

United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987) .. 6

United States v. Gradwell, 243 U.S. 476 (1917) 15

United States v. Harriss, 347 U.S. 612 (1954) 17

United States v. Heyman, 794 F.2d 788 (2nd Cir.), *cert. denied* 479 U.S. 989 (1986) 6

United States v. Hoyland, 903 F.2d 1288 (9th Cir. 1990). 13

United States v. Lewis, 651 F.2d 1163 (6th Cir. 1981) .. 26

United States v. National Dairy Products Corp., 372 U.S. 29 (1963) 17

United States v. Polychron, 841 F.2d 833 (8th Cir.) *cert. denied*, 488 U.S. 851 (1988) 6

United States v. Pomponio, 429 U.S. 10 (1976) 4

United States v. Puerto, 730 F.2d 627 (11th Cir.), *cert. denied* 469 U.S. 847 (1984) 10

United States v. Risk, 843 F.2d 1059 (7th Cir. 1988) ... 6

United States v. Scanio, 900 F.2d 485 (2nd Cir. 1990) .. 7, 13

United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979). 6

United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983) 6

United States v. Varbel, 780 F.2d 758 (9th Cir. 1986) ... 6

Yates v. Evatt, 500 U.S. ____ (1991) 27, 28

Rules:

Rule 13, Rules of the Supreme Court..... 2

Rule 403, Federal Rules of Evidence 20

Rule 404(b), Federal Rules of Evidence..... 18, 19

Rule 801(d)(2)(B), Federal Rules of Evidence..... 20

Rule 28(j), Rules of the Seventh Circuit Court of Appeals 11

Other Authority:

Weinstein's Evidence, Section 801(d)(2)(B)(01)..... 21

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Ronald L. Davenport, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 9, 1991.

Opinion Below

The opinion of the Court of Appeals is reported at *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991). The order denying the petition for rehearing en banc by a vote of six (6) to five (5) and the dissent from that order are reported at ___ F.2d ___ (7th Cir. 1991). The order staying the mandate pending filing of the petition for writ of certiorari is dated September 18, 1991. Those opinions and orders are set forth in the appendix.

Jurisdiction

The date of the entry of the judgment of the court of appeals sought to be reviewed is April 9, 1991. The date of the order denying a rehearing is September 5, 1991. No extension of time within which to file the petition for writ of certiorari was sought or granted. This petition for writ of certiorari is timely in that it was filed prior to the expiration of 90 days after the denial of the petition for rehearing as provided by Rule 13 of the Rules of the Supreme Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1) for a petition for writ of certiorari to the court of appeals. The jurisdiction of the court of appeals was invoked pursuant to 28 U.S.C. 1291 as an appeal from a final decision of the district court. The district court had jurisdiction pursuant to 18 U.S.C. 3231 for offenses against the laws of the United States.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States is involved in this case. Sections 5313, 5322, and 5324 of Title 31 of the United States Code are involved in issues numbered 1 through 3. Sections 103.22 (7-1-86 Edition), 103.22 (7-1-87 Edition), and 103.11(n)(7-1-89 Edition) of Title 31 of the Code of Federal Regulations are also involved in issues numbered 1 through 3. Each of the provisions are set forth in the Appendix hereto.

Statement Of The Case

The petitioner Ronald Davenport and his wife Betty were charged in one count of conspiracy, in violation of 18 U.S.C. 371, and eleven counts of structuring currency transactions for the purpose of evading the reporting requirements, in violation of 31 U.S.C. 5324. The indictment was returned on October 10, 1989. Count 1 charged a conspiracy to structure "a currency transaction in the aggregate amount of $81,500" from Novem-

ber 5, 1987 to November 19, 1987. The overt acts of Count 1 charged ten deposits of currency over the fourteen day period of time. Seven deposits were charged to have been made at the Finance Center Federal Credit Union. Three deposits were charged to have been made at Merchants National Bank.

Count 2 charged a substantive count of structuring the same "currency transaction in the aggregate amount of $81,500" during the same fourteen day period from November 5, 1987 to November 19, 1987.

Counts 3 through 12 charged the same ten deposits of currency on the same dates, each as a separate currency transaction. The court of appeals' decision held that Counts 3 through 12 should have been dismissed. Those counts were multiplicitous of Count 2, and the court of appeals held that the structuring itself was the unit of crime, not each individual deposit. *United States v. Davenport*, 929 F.2d, at 1171-1172.

The defendants were convicted on all twelve counts by a jury on April 11, 1990. On June 29, 1990, both defendants were sentenced to twelve-month executed sentences on all twelve counts, to be served concurrently, followed by two years of supervised release. Both defendants filed notices of appeal. On April 9, 1991, the court of appeals vacated the convictions and sentences on counts three through twelve and affirmed the judgment of the district court as modified.

ARGUMENT

1. The Opinion Below Is Contrary To *Cheek v. United States*, 498 U.S. ____ (1991) By Holding That Persons Who Mistakenly Thought That Their Actions Were Lawful Can Be Guilty Of Having a "Purpose Of Evading The Reporting Requirements."

The statute prohibiting the structuring of currency transactions requires as an element of the crime a "purpose of evading the reporting requirements." 31 U.S.C. 5324. In addition, the criminal penalties statute in the same code subchapter states

that the criminal penalties apply to a "person willfully violating" the subchapter or a regulation. 31 U.S.C. 5322. Willful evasion is the intentional violation of a known legal duty. *United States v. Pomponio*, 429 U.S. 10 (1976).

Unless prohibited by law, "(t)axpayers are, of course, generally free to structure their business affairs as they consider to be in their best interests, including lawful structuring to minimize taxes." *Commissioner v. First Sec. Bank*, 405 U.S. 394, 398 n. 4 (1972). The Bank Secrecy Act, to which the structuring Statute was an amendment, imposes no duty on the public until implementing regulations have been properly promulgated. *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974).

The defendants in this case at the time of their actions thought that their actions were lawful. They sought to avoid violating the currency transaction reporting requirements by the legal means of doing what was not prohibited by law. There was no evidence that the defendants had a purpose to evade the reporting requirements by disregarding a duty they knew they had under the law.

The defendants sought to avoid violating the law by not making deposits over $10,000 on one day by one person at one financial institution. The opinion of the court of appeals recognized that the defendants were acting in "what they thought was a safe haven" in the regulations. 929 F.2d, at 1173.

At the time of the actions of the defendants in 1987, the law on structuring was uncertain. The statute prohibiting structuring was one year old, having been enacted in 1986. 31 U.S.C. 5324. It prohibited any person "for the purpose of evading the reporting requirements of section 5313(a)" structuring "any transaction with one or more domestic financial institutions." Section 5313(a) delegated the promulgation of the reporting requirements to the Secretary of the Treasury, and so, the reporting requirements were actually contained in the regulation found at 31 C.F.R. 103.22. Until April of 1987, the reporting requirements in the regulation required the reporting of

only a deposit or other transaction "by, through, or to such financial institution which involves a transaction in currency of more than $10,000." 31 C.F.R. 103.22 (1986 Edition). In April of 1987, a sentence was added to the regulation containing the reporting requirements, which permitted the aggregation of "multiple currency transactions" on behalf of one person "during any one business day." 31 C.F.R. 103.22 (1987 Edition). An implication from such regulation was that multiple currency transactions on different days did not violate the reporting requirements. It was not until January of 1989, more than a year after the defendants' actions, that the Secretary expanded the aggregation rule and promulgated a regulation stating that structuring could occur on "one or more days." 31 C.F.R. 103.11(n) (1989 Edition).

These reporting requirements are reprinted or summarized in instructions from the Internal Revenue Service. The currency transaction reports and the instructions for those reports are contained on Internal Revenue Service Form 4789. The IRS Form 4789 which was introduced in evidence in this case as one given to Betty Davenport was the December 1985 Revision of IRS Form 4789. Gov't. Ex. 20A. The IRS Form 4789 instructions in evidence in this case which were given to Betty Davenport in 1987 did not contain either of the multiple transaction aggregation reporting requirements promulgated in 1987 or 1989. Govt. Ex. 20A. The government bank witnesses did not testify that they knew in 1987 of the new April 1987 or the 1989 reporting requirements. Thus, the evidence was that the defendants did not know of the new April 1987 reporting requirement or the not-yet promulgated 1989 reporting requirement. The opinion of the court of appeals held that even if the defendants' statements to the agent were true, the defendants were guilty. The opinion of the court of appeals applied the wrong legal standard.

In 1987 the government was not sure either about what constituted a structuring crime and what did not. The defendants were interviewed by the Special Agent of the Internal

Revenue Service Criminal Investigation Division in November of 1987 and they stated that they were trying to avoid violating the reporting requirements at that time. The agent told them this could involve a "possible" violation of the law. (Tr. II-113) The government did not bring the first charges in the case until October, 1989, long after the January 1989 aggregation rule was promulgated. Additionally, ten of the twelve counts charged in the indictment still did not state offenses, which was recognized by the opinion of the court of appeals. 929 F.2d at 1172. Furthermore, the decisions of the courts of appeals around 1987 required the dismissal of structuring counts drafted by the government under prior law. See, e.g. *United States v. Risk*, 843 F.2d 1059 (7th Cir. 1988); *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985). *But see*, *United States v. Polychron*, 841 F.2d 833 (8th Cir.), *cert. denied* 488 U.S. 851 (1988); *United States v. Heyman*, 794 F.2d 788 (2nd Cir.), *cert. denied*, 479 U.S. 989 (1986); *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983); *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979).

It was not unusual during these years for the most learned attorneys to be mistaken as to the structuring law. There were many different opinions at that time as to what actions violated the law and what did not. Businessmen and even lawyers for their personal offices were trying to figure out what transactions they had to report and what they did not have to report under the reporting requirements. It was not unusual for individual citizens who were not lawyers to be mistaken about the structuring law during this time. Many citizens did not want to have filed another IRS form if they did not have to.

The defendants argued on appeal (1) that their actions did not violate the currency transaction reporting requirements in effect in 1987, and (2) that if their actions did violate the reporting requirements, the defendants did not know that their actions were in violation of the reporting requirements

and they had no "purpose of evading the reporting requirements." The opinion of the court of appeals held that their actions were in violation of the statute and that they were guilty even though they had a mistaken knowledge of the law. The opinion stated as follows:

> "They misunderstood section 5324(3), the specific provision under which they were charged. It is not a statute for punishing the cash depositor as an aider and abettor of a bank's violation of the reporting requirement. The target of the statute was not banks, or cash transactors viewed as the accomplices of banks in violating the requirements that the Treasury Department imposes on banks. The target was the transactors — the "money launderers," a term we use broadly to denote persons desiring to convert "hot," suspiciously large, or easily traced cash sums into more discreet media of exchange — themselves. The statute's aim was to prevent people from either causing the (usually innocent) bank to fail to file a required report or defeating the goal of the requirement that large cash deposits be reported to the Internal Revenue Service by breaking their cash hoard into enough separate deposits to avoid activating the requirement. S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986); *United States v. Scanio, supra*, 900 F.2d at 488. The first subsection of the statute strikes at the first abuse and might have been violated by the Davenports' splitting up a deposit of $10,000 or more between branches of the same bank — an attempt to cause the bank not to file a required report. The third subsection strikes at the dominant form of the Davenports' misconduct by forbidding the structuring of a transaction for the purpose of evading the reporting requirement; that is, by forbidding the breaking up of the transaction (here the deposit of $100,000 in cash) into small enough pieces not to trigger the requirement. Far from authorizing the Davenports' conduct, the *one-day regulation* facilitated it, by giving them what *they thought was a safe haven;* if they avoided multiple deposits on the same day (which they didn't quite, and so their scheme failed), the banks would not report their deposits and they would have succeeded

> in concealing the transaction from the Internal Revenue Service. It was to defeat such tactics, fairly described as evasion, that subsection (3) was added to the statute. The Davenports read it out of the statute by arguing that they cannot be guilty if the bank was not required to file a report. They thereby contract the statute to its first subsection.
>
> "Tax avoidance is lawful; money laundering is not. The 'evading' of which section 5324(3) speaks is the attempt to split up a cash hoard in such a way as to defeat the government's efforts to identify money launderers. The Davenports are not people trying to minimize their taxes by finding such loopholes as the law allows. They are people who are trying to conceal the existence of a large amount of cash from the government."

929 F.2d, at 1172-1173 (emphasis added). The end of the opinion of the court of appeals stated that the defendants were guilty even if their statements were true. 929 F.2d at 1175. The court of appeals' opinion substituted an "intention of preventing the filing of currency transaction reports" for the statutory requirement of a "purpose of evading the reporting requirements." *Id.* The opinion of the court of appeals held that it did not matter whether a person knew he was violating the reporting requirements and sought to evade a known legal requirement or whether he did not know he was violating the reporting requirements and sought to avoid violating the law.

The element of a "purpose of evading the reporting requirements" is contained in each of the three subsections. The opinion of the court of appeals disregarded the statutory requirement of a "purpose of evading the reporting requirements" and substituted a general purpose "to defeat the government's efforts to identify money launderers." 929 F.2d at 1173. A purpose "to defeat the government's efforts" is not any part of the crime. Such purpose includes both "safe havens" and unlawful actions. The opinion of the court of appeals applied the wrong legal standard.

The Supreme Court recently held that even if a citizen's misunderstanding of the law was unreasonable but held in good faith, he was not guilty of a specific intent crime. *Cheek v. United States*, 498 U.S. ____ (1991). The Supreme Court reversed the Seventh Circuit and held that a bona fide misunderstanding of the law, even if it is an unreasonable understanding, negates willfulness. There can be no doubt that a statute which requires a "purpose of evading the reporting requirements" contains a willfulness requirement. It contains an evasion requirement.

The *Cheek* decision stated the general rule that ignorance of the law is no defense, because the common law presumed that every person knew the law. However, *Cheek* also recognized an exception to the rule in specific intent cases, because of the proliferation of statutes and regulations making it difficult for citizens to know their obligations. *Cheek* stated as follows:

> "The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "wilfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws. In *United States v. Murdock*, 290 U.S. 389 (1933), the Court recognized that:
>
> > 'Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.'
>
> *Id.*, at 396."

498 U.S., at ____ (slip op., at 7). The statutes which petitioner was charged with violating not only required that the acts be done "wilfully" (31 U.S.C. 5322), but also required a specific "purpose of evading the reporting requirements" (31 U.S.C. 5324). The statutes required a specific intent and purpose of evasion of the reporting requirements. The complex statutes and regulations were described in instructions on IRS Form 4789, which was changed as the statutes and regulations changed. The Government claimed that such reports were necessary for the Internal Revenue Service in criminal, tax, and regulatory investigations. Gov't. Pro. J. Inst. No. 8, citing *United States v. Puerto*, 730 F.2d 627 (11th Cir.), *cert. denied* 469 U.S. 847 (1984). The criminal penalties were enacted separately from the civil penalties (31 U.S.C. 5321) and the other provisions, and the criminal penalties were applied only to persons "willfully violating" the statutes or regulations. 31 U.S.C. 5322.

The *Cheek* decision continued in its discussion of the intent requirement as follows:

> "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant know of this duty, and that he voluntarily and intentionally violated that duty. We deal first with the case where the issue is whether the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating, a case in which there is no claim that the provision at issue is invalid. In such a case, if the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it,

> misunderstand the law, or believe that the duty does not exist. In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable."

498 U.S., at ____ (slip op., at 9).

The Court disagreed with the Seventh Circuit Court of Appeals' statement that a defendant's misunderstanding of the law must be objectively reasonable. The Court stated as follows:

> "We thus disagree with the Court of Appeals' requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue."

498 U.S., at ____ (slip op., at 10). The *Cheek* case involved the legal standard contained in an instruction to the jury, and the Davenports' case involves the same legal standard for review of the evidence on appeal. The opinion of the court of appeals applied a looser legal standard for the government's proof on specific intent contrary to the *Cheek* decision.

The *Cheek* opinion was issued after the briefing was concluded in this case, and so, the parties did not have an opportunity to argue to the court of appeals how the *Cheek* decision applied to this case. The *Cheek* opinion was cited to the court of appeals in a citation of supplemental authority, which by Circuit Rule was required to be limited to one sentence. Rule 28(j), Rules of Seventh Circuit Court of Appeals. The opinion of the court of appeals did not cite, discuss, or recognize in any way the *Cheek* decision. The court of appeals ignored that recent decision of the Supreme Court. The Court should either grant certiorari or should grant a summary disposition and remand to the court of appeals to consider the recently issued decision.

Even in non-IRS cases, a criminal intent has been required based on the language of "wilfully and knowingly," without the more specific language of a "purpose of evading the reporting requirements." *Morissette v. United States*, 342 U.S. 246 (1952). Proof of the commission of the acts without a criminal intent is not generally sufficient to prove a crime, unless a crime is a strict liability crime. The language of the statutes involved in petitioner's case make clear that the crime charged is not a strict liability crime.

Other courts which have considered the application of *Cheek* to structuring violations have split. The first decision to have considered the issue was *United States v. Aversa*, 762 F.Supp. 441 (D.N.H. 1991), which found that *Cheek* obviously applied. The decision was dated April 29, 1991.

The second decision to consider the issue was rendered two months later on June 27, 1991. *United States v. Dashney*, 937 F.2d 532 (1991). It did not cite *Aversa*, *supra*, or indicate that the court was aware of *Aversa*. *Dashney* held that *Cheek* does not apply to structuring violations. However, *Dashney* was consistent with *Cheek* in that it held that the defendant's knowledge of the reporting requirements was required by law, and that the defendant was well aware of the reporting requirements. *Dashney* held that the defendant need not know of the criminal structuring statute, but that he must know of the reporting requirements in order to have a "purpose of evading the reporting requirements." The petitioner in this case does not claim that he had to know the criminal structuring statute, but rather, that he had to know the reporting requirements in order to be found guilty of having a "purpose of evading the reporting requirements."

The trial court in *Dashney* also instructed that conviction required the "specific intent to do something the law forbids" and "purposely intending to violate the law." In that case a bank vice president told the defendant that multiple transactions over $10,000 required a Currency Transaction Report (CTR), and the defendant's actions were in December of 1989,

after all of the amendments discussed above. Also, all of the transactions were on one day in that case.

The decisions of the court of appeals which were issued before the *Cheek* opinion made various kinds of statements about the knowledge and intent required for a structuring violation. A careful reading of those decisions discloses that they are consistent with the petitioner's position that knowledge of the reporting requirements is required to prove a "purpose of evading the reporting requirements," but that knowledge of the criminal statute on structuring is not required. *United States v. Scanio*, 900 F.2d 485 (2nd Cir. 1990) held that knowledge of the reporting requirements was required, but not knowledge of the criminal statute prohibiting structuring. *United States v. Hoyland*, 903 F.2d 1288, 1289-1292 (9th Cir. 1990) concurred in the analysis of *Scanio*, but it contains language which implies that the defendant need not have knowledge that his actions are "illegal." *Hoyland* did not address directly the issue of whether knowledge of the reporting requirements was required to prove a "purpose of evading the reporting requirements."

Thus, there is an apparent split of the circuits on the knowledge required for a structuring violation. *Davenport* says that defendants can be guilty even if they thought they were in a "safe haven" in the regulations. *Scanio* says that knowledge of the reporting requirements is required, but not knowledge of the criminal statute. *Hoyland* agrees with analysis of *Scanio*, but implies that a defendant need not know that his conduct is "unlawful."

Dashney rejected the application of *Cheek* to the structuring statute, but the decision is consistent with *Cheek* to the extent that it required knowledge of the reporting requirements. *Aversa* applied *Cheek* to the structuring violation and implied that knowledge of the structuring statute was required as well as knowledge of the reporting requirements.

The courts need guidance. The government needs guidance.

The citizens need guidance. We are all struggling to determine what knowledge is required for the structuring violations. Only this court can give that guidance.

If this Court does not grant certiorari, the case should at least be remanded to the court of appeals so that the court of appeals can consider the *Cheek* decision which was issued after the briefing of this case.

The opinion of the court of appeals in petitioner's case affirmed the convictions on the belief that the defendants were "people who are trying to conceal the existence of a large amount of cash from the government" instead of on the basis of whether they had the statutory "purpose of evading the reporting requirements." The opinion of the court of appeals gave the impression that the convictions should be affirmed because the court concluded that the defendants were bad people, instead of analyzing whether the defendants violated the law. Such reasoning leaves us all subject to conviction for a crime if someone believes that we are a bad person or trying to hide something from the government. If we give up the rule of law in favor of the rule of men, we give up one of the most important principles which has made our country great in the past. Additionally, the defendants in this case were hard working citizens employed in full-time jobs with good performance evaluations as an Army sergeant and an assistant manager of a small branch bank in West Germany.

2. **The Opinion's Application Of The Statute Is Violative Of the Statute, Because The Opinion Interprets The Statutory "Purpose of Evading The Reporting Requirements" To Require Only An Attempt "To Defeat The Government's Efforts To Identify Money Launderers."**

The opinion below in the discussion of the vagueness challenge recognized the statutory requirement of deliberate evasion, but the opinion applied the evasion requirement to include in evasion any "attempt to split up a cash hoard in such a way as to defeat the government's efforts." The opinion below stated as follows:

> "The government concedes, moreover, that the statute requires it to prove that a defendant knew the reporting requirements and was deliberately seeking to evade them by multiple deposits (or withdrawals). It is difficult to see how a statute that requires such knowledge as a predicate for conviction could be unconstitutionally vague, *Screws v. United States*, 325 U.S. 91, 104 (1945) (plurality opinion); cf. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), since the defendant who because of its vagueness did not understand what the statute meant would not have the requisite knowledge and therefore could not be convicted. To insist on too much precision would merely open up a new set of loopholes."

929 F.2d, at 1173. In the application of the statute, the opinion below ignored the knowledge requirement and applied the statute to "the attempt to split up a cash hoard in such a way as to defeat the government's efforts."

> "Tax avoidance is lawful; money laundering is not. The 'evading' of which section 5324(3) speaks is the attempt to split up a cash hoard in such a way as to defeat the government's efforts to identify money launderers. The Davenports are not people trying to minimize their taxes by finding such loopholes as the law allows. They are people who are trying to conceal the existence of a large amount of cash from the government.

Id. The opinion of the court of appeals applied the statute to expand "evading" to include "the attempt to split up a cash hoard in such a way as to defeat the government's efforts to identify money launderers" and "trying to conceal the existence of a large amount of cash from the government" instead of the statutory "purpose of evading the reporting requirements." The application of the statute beyond its plain meaning is violative of the statute. Before a citizen can be punished as a criminal under a federal law, his case must be plainly and unmistakably within the provisions of some statute. *United States v. Gradwell*, 243 U.S. 476 (1917). Trying to anticipate the

"government's efforts" and the meaning of "to defeat" the efforts is not prohibited by the statute, and it could not be.

3. **If The Statutory Language Can Be Expanded To Apply To Any Attempt "To Defeat The Government's Efforts," Such Application Of The Statute Is Unconstitutionally Vague As Applied.**

If the court of appeals' application of the statute is not violative of the statute, such application makes the statute unconstitutionally vague. The Court held in *Giaccio v. State of Pennsylvania*, 382 U.S. 399 (1966) that interpretations using "loose and unlimiting terms" fail to measure up to the due process clause.

There is no way for a citizen to determine the limits of the "government's efforts to identify money launderers" or the other phrases applied by the opinion below. The numerous counts of indictments in this case and many other cases which were drafted by the government and which have been dismissed for failure to allege crimes are examples of why it can not be a crime for any person to "attempt to split up a cash hoard in such a way as to defeat the government's efforts to identify money launderers." 929 F.2d at 1173. The law is so vague under such application that anyone could be convicted. No one could determine what was legal and what was illegal, until the government said later that it was an attempt to defeat its efforts.

An application of the term "evade" to define its meaning as attempts to "defeat the government's efforts" is more vague than the other terms found to be unconstitutionally vague by the Court. *Conally v. General Construction Co.*, 269 U.S. 385 (1926) ("current rate" and "locality"); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) ("gang"); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) ("annoys"); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy statute); *Smith v. Goguen*, 415 U.S. 566 (1974) ("treats contemptuously the flag"); *Colautti v. Franklin*, 439 U.S. 379 (1979) (fetus "may be viable");

Kolender v. Lawson, 461 U.S. 352 (1983) ("credible and reliable" identification); *City of Akron v. Akron Center For Reprod. Health*, 462 U.S. 416, 451 (1983) (disposal of an unborn child in a "humane and sanitary manner").

The expanded application of the structuring statute in the *Davenport* decision is exactly the opposite of the situation in which a narrow interpretation of a statutory term saves the term from vagueness. A narrow interpretation of the statutory term "lobbying," which limited the term to direct communication with members of Congress on pending or proposed federal legislation, gave fair notice to the citizens. *United States v. Harriss*, 347 U.S. 612, 617 (1954). The words "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" were not unreasonably vague as narrowed by the courts to sales "below cost" for the purpose of destroying competition. *United States v. National Dairy Products Corp..*, 372 U.S. 29 (1963).

Instead of narrowing the term "evade" or applying its normal meaning, the *Davenport* decision broadened the definition of "evade" to mean "the attempt to split up a cash hoard in such a way as to defeat the government's efforts to identify money launderers." The application disregarded the knowledge requirement completely. The application held that persons who thought that they were in a "safe haven" were guilty because they were attempting "to defeat the government's efforts." No one can tell what the government's efforts" will be. Nor is there any meaning given to the term "to defeat." The application of the *Davenport* decision simply means that anyone the government wants to prosecute is guilty. This is wrong.

4. Uncharged Other Acts Proven To A Standard Of "Fishiness," Instead Of Proven By A Preponderance Of The Evidence, Are Not Admissible In Evidence.

The opinion below stated as follows:

> "The defendants complain about the admission of the statements that they made to the agents, particularly the

> statements that *cast doubt* on their story that the $100,000 was an inheritance, *including such evasive statements (or non-statements) as Mrs. Davenport's refusal to give the agent the name of her husband's father.* The Davenports say it is irrelevant to their guilt of the crime of which they were charged where they got the money. It is not irrelevant. The shadier the source, the greater the Davenports' motive to conceal the money from the authorities by taking measures to thwart the reporting requirements. If it really had been an inheritance, they would have had no incentive to conceal it from the Internal Revenue Service, since it was too small to create any estate tax liability. True, this assumes that the alleged bequest to Mr. Davenport was the entire estate — and there might have been other bequests, in which event the estate might have been large enough to owe estate tax, and such tax would be chargeable against the beneficiaries, who might all decide to try to structure the bequests (if they were large, and in cash) to avoid reporting by the banks and thereby beat the estate tax. But *these speculations really do carry us into cloudcuckooland.*
>
> "If, however, the cash was *stolen*, the Davenports would have every incentive to conceal it, if only because stolen money is taxable income. So the *fishiness of the inheritance story was circumstantial evidence* that the structuring was done with the evasive purpose that the statute requires for liability."

929 F.2d, at 1173-1174 (emphasis added). The source of the money was not in issue in this case. That was agreed by the government and the defendants. The evidence about the source of the money was not admissible, except to prove intent and motive, as permitted by Rule 404(b) governing the admission of other act evidence. Before such uncharged other act evidence is admissible, it must be proven by a preponderance of the evidence. *Huddleston v. United States*, 485 U.S. 681 (1988).

The other act evidence in this case consisted of the questioning of the defendants about the source of the money and exten-

sive third party testimony causing suspicion that the money may have been stolen. The court of appeals held that the other act testimony was admissible because of the "fishiness" of defendant's story about an inheritance as the source of the money. While a defendant's explanation of the *charged* crime may be introduced into evidence as an admission of the charged crime, the defendant can not be asked about other possible crimes and then introduce the explanations of the *uncharged* crimes to prove that they are "fishy," unless those crimes are proven by a preponderance of the evidence. Otherwise, the evidence is introduced merely to prejudice the defendants in the eyes of the jury instead of proving other acts.

The *Davenport* decision engaged in "speculations" which "really do carry us into cloudcuckooland." 929 F.2d at 1174. The other acts were admittedly not proven by a preponderance of the evidence. The *Davenport* decision stated that the "shadier the source, the greater the Davenports' motive to conceal the money." *Id.* However, the source was never proven by a preponderance of the evidence. The *Davenport* decision implied that the money was "stolen" from some unknown source. This speculative evidence was highly prejudicial to the defendants in the trial court and in the court of appeals.

The defendants appealed the introduction of the extensive 404(b) evidence from other witnesses and the refusals to answer which "cast doubt" on their story of the source of the money and which raised a suspicion, but which did not prove, that the cash was stolen. The opinion states that evidence showing a "fishiness" that the money was stolen is sufficient. That is completely contrary to *Huddleston*.

When the objection was made that mere skepticism is insufficient, citing *United States v. DeGeratto*, 876 F.2d 576 (7th Cir. 1989), the trial court admitted the evidence with the following statement: "Well, it's going to be for the jury to decide. Maybe they will be skeptical." Tr. II-167. Proof of uncharged acts is admissible under Rule 404(b) only if proven by a preponderance of the evidence, not proof raising "skepticism" or

"fishiness." The district court and the court of appeals have disregarded the law.

In this case the trial court admitted the evidence on the basis that the jury would be permitted to be "skeptical," and the court of appeals affirmed with the statement that "these speculations really do carry us into cloudcuckooland." This is completely unjust. To allow such practices to remain uncorrected and approved in a published opinion would undermine the integrity of the law enforcement system and the courts.

Furthermore, there was absolutely no weighing of the probative value against the danger of unfair prejudice as requested by the defendant and as required by Rule 403 of the Federal Rules of Evidence and *DeGeratto, supra*, which was cited to the court.

5. **When The Government Gives A Person Warnings Implying That His Refusal To Give Possibly Incriminating Answers Would Not Be Used Against Him, The Government Can Not In Its Case In Chief At Trial Introduce In Evidence As Admissions Of Guilt The Defendant's Refusal To Answer Some Questions In The Government Interview.**

When the defendants were interviewed by the IRS agent at the time of the transactions, they were given *Miranda*-type warnings which informed them that they could not be compelled to answer any question which "might tend to incriminate you in any way." (Tr. II-83). The defendants answered some questions and refused to answer other questions. At trial the government then introduced the defendants' refusals to answer some questions as admissions of guilt in the government's case in chief. As Chief Judge Bauer succinctly stated in his dissent, the defendants "were told that they did not have to answer questions — then their refusal was stuffed up their noses at trial." App. A-3.

A refusal to answer a question after a warning from a government agent about answering questions is not even admissible as an admission under Rule 801(d)(2)(B) of the Federal Rules of

Evidence, because it is so ambiguous about an unknown possibly incriminating answer to a question about an unknown possible crime as to have no specific meaning. See, *Weinstein's Evidence*, Section 801(d)(2)(B)(01). The *Davenport* decision holding that such a refusal to answer a government question is an admission of guilt, is an unheard-of position, even disregarding the previous decisions of the Supreme Court.

The decisions of the Supreme Court have made clear that when a government agent advises a person that the person has a right to remain silent, the government implies to that person that his refusal to answer a question can not be used against the person at trial. *Doyle v. Ohio*, 426 U.S. 610 (1976). A summary of the decisions of the Court on the issue is set forth in *Greer v. Miller*, 483 U.S. 756 (1987) as follows:

> "The starting point of our analysis is *Doyle v. Ohio*, 426 U.S. 610 (1976). The petitioners in *Doyle* were arrested for selling marijuana. They were given *Miranda* warnings and made no postarrest statements about their involvement in the crime. They contended at trial that they had been framed by the government informant. As part of his cross-examination, the prosecutor repeatedly asked questions why, if they were innocent, they did not give the explanation that they proffered at their separate trials to the police at the time of their arrest. Defense counsels' timely objections to this line of questioning was overruled. Also over timely objections, the trial court allowed the prosecutor to argue petitioners' postarrest silence to the jury. 426 U.S., at 613-615, and n. 5. On review, this Court found that the *Miranda* decision "compel[led] rejection" of the contention that such questioning and argument are proper means of impeachment. 426 U.S., at 617. The Court noted that postarrest silence may not be particularly probative of guilt. We also found that because *Miranda* warnings contain an implicit assurance "that silence will carry no penalty," 426 U.S., at 618, "'it does not comport with due process to permit the prosecution during the trial to call attention to [the defendant's] silence at the time of arrest and to insist that because he

did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony,' "*id.*, at 619 (quoting *United States v. Hale*, 422 U.S. 171, 182-183 (1975) (WHITE, J., concurring in judgment)). Accordingly, the Court in *Doyle* held that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S., at 619.

"This Court has applied the holding of *Doyle* in a number of subsequent cases. These later holdings confirm that "*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.' " *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) (quoting *South Dakota v. Neville*, 459 U.S. 553, 565 (1983)). Thus, "absen[t] the sort of affirmative assurances embodied in the *Miranda* warnings," The Constitution does not prohibit the use of a defendant's postarrest silence to impeach him at trial. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). See *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) ("[N]o governmental action induced [the defendant] to remain silent *before* arrest') (emphasis added); *Anderson v. Charles*, 447 U.S. 404, 408 (1980) (cross-examination respecting inconsistent post arrest statements "makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent").

"There is no question that Miller received the "implicit assurance" of *Miranda* warnings in this case. Thus, this prerequisite of a *Doyle* violation was met. But the holding of *Doyle* is that the Due Process Clause bars "*the use* for impeachment purposes" of a defendant's postarrest silence. 426 U.S., at 619 (emphasis added). The Court noted that " 'it does not comport with due process *to permit* the prosecution during trial to call attention to (the defendant's) silence.' " *Ibid.* (quoting *United States v.*

> *Hale*, *supra*, at 182-183 (WHITE, J., concurring in judgment) (emphasis added). It is significant that in each of the cases in which this Court has applied *Doyle*, the trial court has permitted specific inquiry or argument respecting the defendant's post-Miranda silence. See *Jenkins v. Anderson*, *supra*, at 233-234 (extended questioning and closing argument reference); *Anderson v. Charles*, *supra*, at 405-406 (questioning); *Fletcher v. Weir*, *supra*, at 603-604 (questioning); *South Dakota v. Neville*, *supra*, at 564 (admission of refusal to take blood-alcohol test); *Wainwright v. Greenfield*, *supra*, at 285, 287 (closing argument)."

483 U.S. 761-764 (emphasis in original). The *Greer* decision affirmed the conviction in that case because the trial court upheld the defense objection and instructed the jury to disregard the matter. In Petitioner's case the court overruled the defense motion, did not instruct the jury to disregard the matter, and permitted the prosecutor to argue to the jury in final argument that the defendants must be guilty because they refused to answer questions after the IRS agent told them that they had a right to refuse to answer certain questions.

The rule was violated in this case repeatedly. The government agent testified at trial that Betty Davenport refused to answer his questions about what bank cashed the inheritance check and the name of her husband's father. Tr. II-97-98. The government agent testified at trial that Ronald Davenport refused to answer his questions about the address of the house where the safe was maintained, and the name of the woman living with his father. Tr. II-103-104. The defendants moved for mistrial, and the motion was denied. Tr. II-150-151. With this encouragement from the court, the government then argued in final argument as follows:

> "Of course that check never was found; she wouldn't even tell Mr. Neukam what bank it was. That's evidence right there. Why wouldn't she tell him if this was a legitimate situation?"

The defendants moved for mistrial again, and the motion was denied. Tr. III-202-203.

The violation in Petitioner's case was also much worse than the other cases because Petitioner had not even testified. There was no testimony of the defendant to impeach. The refusal to answer questions after being advised that the defendant does not have to answer questions certainly can not be used in the Government's case in chief. *United States v. Caro*, 637 F.2d 869, 874 (2nd Cir. 1981).

A decision involving the issue of whether a defendant's silence after warnings could be used on the insanity issue made the point that if silence can not be used to impeach a defendant, it certainly can not be used as evidence on a central issue in the case. It stated as follows:

> "If silence cannot be used even to impeach the defendant's testimony, not because it has no probative significance but because its use breaks the promise implicit in the *Miranda* warnings, by what logic could it be used to show the defendant's sanity?
>
> * * * *
>
> "It was common ground among all the Justices in *Greenfield* and, so far as we are able to determine, among all other federal judges between *Doyle* and *Greenfield*, that the use of mere silence (after *Miranda* warnings had been given) for any purpose violated the defendant's constitutional rights."

Thomas v. State of Indiana, 910 F.2d 1413, 1416 (7th Cir. 1990). That decision did not even involve the federal government as a party, and the decision ordered a new trial for the state defendant in a habeas corpus action.

If a defendant chooses to testify, and if the defendant gives an explanation which she had not given before, and if no warnings about answering questions were given to her, then her failure to give the same explanation to which she testified may be used as *impeachment* against her. *Jenkins v. Anderson*, 447

U.S. 230, 240, (1980). The *Jenkins* decision related to the use of silence for *impeachment*, not the use of silence as *admissions of guilt*. Even more importantly in this case, the *Jenkins* decision recognized that the situation was not one in which *Miranda*-type warnings were given. The *Jenkins* decision specifically stated:

> "In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case. We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment."

447 U.S., at 240. The *Davenport* decision below has interpreted the *Jenkins* decision to permit IRS agents and all other government agents to warn persons about answering questions and then introduce their refusals to answer questions as admissions of guilt in the government's case in chief. This is a radical departure from the general practice of law enforcement agencies and prosecutors. The encouragement of this practice by the *Davenport* decision will do irreparable harm to the rights of citizens and to law enforcement. The practice will be condemned at some point. The longer the practice is allowed to be encouraged by the *Davenport* decision, the more damage it will do to citizens and to cases which use the improper practice.

The *Davenport* decision appears to be contrary to *Jenkins* and should be reversed. If the *Davenport* decision is not contrary to *Jenkins*, then the Court must decide the issue involving the use of refusals to answer after the person was warned about answering, but before arrest.

The government's argument that a defendant's refusal to answer, after being warned that he has a right not to answer, is an admission of guilt is also similar to the argument prohibited in *Griffin v. California*, 380 U.S. 609 (1965), which prohibits argument on the defendant's refusal to testify during trial.

The court of appeals opinion gives no clear reason as to why the procedure encouraged is not error. The opinion suggests

that it might not be error since the defendants answered some questions and not others. The law is clear that a citizen has a right to stop answering questions at any time. *Miranda v. Arizona*, 384 U.S. 436, 473-474 (966); *Smith v. Cadagin*, 902 F.2d 553, 557 (7th Cir. 1990). Nor does it matter that a defendant is not in custody. The focus is on the implied promise of the warning. *United States v. Edwards*, 885 F.2d 377, 386-387 (7th Cir. 1989); *United States v. Lewis*, 651 F.2d 1163, 1168 (6th Cir. 1981). Only where "no government action induced" prearrest silence does it not violate the constitution to use the silence for *impeachment* purposes. *Jenkins v. Anderson, supra*. The opinion below encourages the government to give a citizen warnings, ask about other acts not charged, and introduce as admissions of guilt on the charged crime fishy or skeptical refusals to answer questions about the uncharged acts on the ground that the government can impeach its own improper evidence. This practice is illegal for the several reasons stated above. The convictions in this case are illegal and unjust.

6. The Admission Of Improper Testimony Is Not Harmless Beyond A Reasonable Doubt When The Government Highlighted The Improper Testimony During Its Closing Argument, The Jury During Its Deliberations Specifically Requested A Transcript Of The Improper Testimony And The Court Of Appeals Opinion Relied On The Improper Testimony.

The opinion also stated that if there was any error, the government agent's testimony and the prosecutor's argument was harmless beyond a reasonable doubt. The government agent repeatedly testified that the defendants refused to answer certain questions. After the defendants moved for mistrial, the government highlighted the improper testimony in its closing argument. The jury during its deliberations specifically requested a transcript of that testimony. The original note from the jury is with the exhibits in the record.

Finally, the opinion below relied on "such evasive statements (or non-statements) as Mrs. Davenport's refusal to give the agent the name of her husband's father" (929 F.2d at 1173) as "circumstantial evidence that the structuring was done with the evasive purpose" (929 F.2d, at 1174).

The government did not claim that the error was harmless. There was no showing of harmless error. There was no briefing or argument in the court of appeals as to whether the error was harmless. The court of appeals raised it for the first time in its decision. The court of appeals was apparently not aware until after its decision of the note from the jury requesting the agent's testimony.

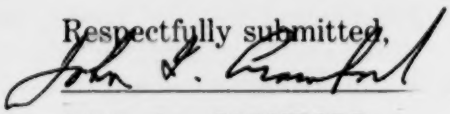
Arizona v. Fulminante, 499 U.S. ____ (1991), makes clear that the government (or state) has the burden of demonstrating that the admission of improper evidence did not contribute to the conviction. The government carried no such burden in this case. It is improper for the court of appeals to attempt to carry the burden for the government when the government has made no showing of harmless error, made no argument of harmless error, and given the defendant no opportunity to brief or argue harmless error.

An error is harmless beyond a reasonable doubt so as not to contribute to a verdict only if it is unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record. *Yates v. Evatt*, 500 U.S. ____ (1991). When the jury asks about a matter during deliberations, it can not be harmless error. E.g., *Cheek v. United States*, *supra*. The government highlighted the improper testimony in argument, the jury requested the testimony, and the court of appeals relied on the testimony. It can not be harmless beyond a reasonable doubt. The opinion below disregards the law.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the judgment should be vacated in a summary disposition and the case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Cheek v. United States*, 498 U.S. ____ (1991) or *Yates v. Evatt*, 500 U.S. ____ (1991).

Respectfully submitted,



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Appendix

APPENDIX

	Page
Order Staying Mandate Pending Petition For Certiorari.	A-1
Denial Of Petition For Rehearing En Banc With Dissent.	A-2
Opinion Of Court Of Appeals	A-5
Amendment V, Constitution of the United States	A-19
Title 31, United States Code, Section 5313	A-19
Title 31, United States Code, Section 5322	A-19
Title 31, United States Code, Section 5324	A-20
Title 31, Code of Federal Regulations, Section 103.11(n) (7-1-89 Edition)	A-20
Title 31, Code of Federal Regulations, Section 103.22 (7-1-86 Edition)	A-21
Title 31, Code of Federal Regulations, Section 103.22 (7-1-87 Edition)	A-21

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 18, 1991

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon.
Hon.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	) Appeals from the) United States) District Court for
Nos. 90-2500 and 90-2501 v.	) the Southern) District of
RONALD L. DAVENPORT, BETTY L. DAVENPORT, *Defendants-Appellants*.	) Indiana,) Indianapolis) Division.)
	) No. 89 CR 144) Sarah Evans) Barker,) Judge.

This matter comes before the court for its consideration of the MOTION TO STAY MANDATE filed herein on 9/13/91, by counsel for the appellants. On consideration thereof,

IT IS-ORDERED that said motion is GRANTED and the mandate in these appeals is stayed to and including 10/17/91.

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 90-2500, 90-2501
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD L. DAVENPORT and
BETTY L. DAVENPORT,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Indiana, Indianapolis, Division.
No. 89 CR 144—**Sarah E. Barker,** *Judge.*

ON PETITION FOR REHEARING AND REHEARING EN BANC
DECIDED SEPTEMBER 5, 1991

Before BAUER, *Chief Judge,* and CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION and KANNE, *Circuit Judges.*

PER CURIAM. On April 23, 1991, defendants-appellants filed a petition for rehearing with suggestion for rehearing en banc. An answer to the petition was requested and response was filed by the plaintiff-appellee on May 21, 1991. All of the judges on the original panel voted to deny a rehearing. A judge in regular active service requested a vote and a majority of the judges voted to deny a rehearing en banc. BAUER, *Chief Judge,* and CUMMINGS, CUDAHY, FLAUM and RIPPLE, *Circuit Judges,* voted to grant rehearing. Chief Judge Bauer has filed a dissenting opinion joined by Judge Ripple.

The petition for rehearing is DENIED.

BAUER, *Chief Judge,* dissenting from the denial of rehearing *en banc,* joined by RIPPLE, *Circuit Judge.* In its argument defending the panel opinion, the government relies on *Jenkins v. Anderson,* 447 U.S. 230 (1980), to support its claim that it

was not improper to comment on the Davenports' silence during questioning by government agents. But the government's reliance on *Jenkins* may be misplaced.

Jenkins holds that where no governmental action induced the defendant to remain silent before arrest and where the failure to speak occured before the defendant was taken into custody and given *Miranda* warnings, then impeachment by use of prearrest silence does not violate the Constitution. 447 U.S. at 240. (*Jenkins* involved a situation in which the defendant stabbed and killed the victim, but was not apprehended until he turned himself in two weeks later. At his state trial for murder, the defendant claimed that the killing was in self-defense. During cross-examination of the defendant and in its closing argument, the government commented on the defendant's prearrest silence, *i.e.* the fact that the defendant waited two weeks before telling the police that he acted in self-defense.)

Nevertheless, *Jenkins* and the instant case are not factually identical. For instance, the Davenports' silence involved the refusal to answer certain questions put to them by agents of the Internal Revenue Service. Moreover, before the questioning began, the Davenports were warned that they had a right to remain silent, but that anything they said could be used against them. Thus, one can argue rather persuasively, I believe, that the instant case is clearly distinguishable from *Jenkins* in that, here, the government induced the silence by questioning, and that the silence occurred after the Davenports were given *Miranda* warnings.[1]

In *United States v. Edwards*, 885 F.2d 377 (7th Cir. 1989), this court declared:

> Generally a prosecutor may not offer evidence and may

---

[1] I recognize that the questioning was non-custodial, and, therefore, no *Miranda* warning was required. The point is, they did receive a *Miranda* warning and were told that they did not have to answer questions — then their refusal was stuffed up their noses at trial.

> not comment upon a defendant's decision to exercise his fifth amendment right against self-incrimination, at least where that right is invoked after hearing the *Miranda* rights. The rule is not absolute however. The rule in such cases comes down to this: the state may not first implicitly warn the defendant that silence will not be used against him and then accost him at trial once he remains silent.

885 F.2d at 386-87 (citations omitted). Judge Posner's opinion seemingly distinguishes this line of cases by pointing out that the Davenports began answering the agents' questions, and then decided to stop talking. Judge Posner finds that once the Davenports began down "the self-exculpation road . . . they forfeited their privilege not to answer questions concerning [their] version [of the events]." Slip at 8-9.

I am inclined to believe that the instant case falls under the *Edwards* rule, not the *Jenkins* exception. Therefore, I dissent from the order denying the petition.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ronald L. DAVENPORT and Betty L. Davenport, Defendants-Appellants.

Nos. 90-2500, 90-2501.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 19, 1991.

Decided April 9, 1991.

Following jury trial before the United States District Court for the Southern District of Indiana. Sarah Evans Barker, Jr., defendants were convicted of several counts of "structuring" their cash transactions with banks to prevent banks from filing currency transaction reports. Defendants appealed. The Court of Appeals, Posner, Circuit Judge, held that: (1) unit of violation for crime of structuring was structuring itself, rather than each individual deposit; (2) statements defendants made to Internal Revenue Service (IRS) agents, investigating currency transaction reports, were admissible in evidence against them to show intent; and (3) admission of statements, and evidence of defendants' refusal to answer certain questions, did not violate their privilege against self-incrimination or any due process right not to be enticed into incriminating themselves.

Modified and affirmed.

1. Criminal Law 29(5)

Unit of violation for crime of "structuring" cash transactions to prevent banks from filing currency transaction reports was structuring itself, rather than each individual deposit. 31 U.S.C.A. §5324(3).

2. Indictment and Information 129(1)

Defendants charged with structuring cash transactions to prevent banks from filing currency transaction reports could not be charged with individual count for each deposit they made in trying structure transaction of $100,000; statute did not forbid making of deposits, but structuring of transaction, which was unit of crime. 31 U.S.C.A. §5324(3).

3. Criminal Law 1181.5(8)

Practice in vacating conviction, for which concurrent sentence was received, is to remand for resentencing on valid counts, to avoid any possibility that judge may have sentenced defendant more heavily on valid counts due to erroneous belief that he was guilty of additional crimes.

4. United States 34

Fact that banks were not required to file currency transaction reports on most of defendants' deposits, because defendants usually did not deposit more than $10,000 at any financial institution on a single day, did not preclude their conviction of illegally structuring cash transaction to prevent banks from filing currency transaction reports. 31 U.S.C.A. §5324(3).

5. United States 34

Definition of "structuring" as included in statute prohibiting structuring of cash transactions to prevent banks from filing currency transaction reports was not unconstitutionally vague; in view of the basic requirement of evasion, "structur[ing] any transaction" meant altering form of transaction in order to avoid activating bank's duty to file currency transaction report. 31 U.S.C.A. §5324(3); U.S.C.A. Const. Amend. 14.

6. United States 34

Statute prohibiting structuring of cash transaction to prevent banks from filing currency transaction reports could not

be held unconstitutionally vague where statute required knowledge of reporting requirements and deliberate seeking to evade them as predicate for conviction. 31 U.S.C.A. §5324(3); U.S.C.A. Const.Amend. 14.

7. United States 34

"Fishiness" of inheritance story, which defendants gave Internal Revenue Service (IRS) agent investigating bank currency transaction reports concerning their deposits, was circumstantial evidence that structuring, with which they were subsequently charged, was done with evasive purpose, which statute required for liability, of attempting to prevent bank from filing currency transaction reports. 31 U.S.C.A. §5324(3); U.S.C.A. Const. Amend. 14.

8. Criminal Law 371(1)

Admission of defendants' statements, given in explanation to Internal Revenue Service (IRS) agent who was investigating bank currency transaction reports, in which defendants stated that large sums of cash they had deposited were part of inheritance, were admissible to show intent in prosecution for structuring cash transactions to prevent filing of currency transaction reports. Fed. Rules Evid. Rule 404(b), 28 U.S.C.A.; 31 U.S.C.A. §5324(3).

9. Criminal Law 407(1), 412(5)

Admission of noncustodial statements that defendants voluntarily gave Internal Revenue Service (IRS) agent, who was investigating cash transactions reported on bank currency transaction reports, in defendants' subsequent prosecution for structuring cash transactions to prevent banks from filing such reports did not violate defendants' privilege against self-incrimination; once defendants voluntarily gave agent their version of events, defendants forfeited their privilege not to answer questions concerning that version. U.S.C.A. Const. Amend. 5.

10. Witnesses 305(1)

Witness who makes incriminating statement cannot use privilege against compulsory self-incrimination to block cross-examination by claiming that his answers to cross-examining lawyer's questions may incriminate him. U.S.C.A. Const. Amend. 5.

11. Constitutional Law 266.1(1)
Criminal Law 407(1)

Using defendant's refusal to answer certain questions posed by Internal Revenue Service (IRS) agent against her in prosecution for structuring cash transactions to prevent banks from filing currency transaction reports did not violate any due process right; outside setting of custodial interrogation, defendant's willingness to answer some questions, by giving agent her version of events concerning purported inheritance that led to large cash deposits, could be weighed in deciding whether she forfeited right to object to comment on later refusal to answer other questions. U.S.C.A. Const. Amend. 14.

12. Criminal Law 1171.5

Even assuming that prosecution was improperly allowed to comment on defendant's silence in response to certain questions posed by government agent, any error was harmless beyond reasonable doubt where no rational jury could have acquitted defendant of crime of structuring cash transactions to prevent banks from filing currency transaction reports, even if jury believed defendant's version of events, under which she claimed receipt of large cash inheritance, where before defendants ceased talking to agent, both defendants admitted that they had acted with intention of preventing filing of currency transaction reports.

13. Criminal Law 721(4)

Outside setting of custodial interrogation, willingness to

answer some questions can properly be given greater weight in deciding whether willingness should forfeit right to object to comment on refusal to answer particular question.

Larry A. Mackey, James M. Warden, Asst. U.S. Atty., Office of the U.S. Atty., Indianapolis, Ind., for plaintiff-appellee.

Richard L. Darst, Mantel, Cohen, Garelick, Reiswerg & Fishman, Kevin McShane, Indianapolis, Ind., for defendants-appellants.

Before WOOD, Jr., POSNER and MANION, Circuit Judges.

POSNER, Circuit Judge.

A jury convicted Mr. and Mrs. Davenport of having violated 31 U.S.C. §5324(3), a statute enacted in 1986 to deter people from "structuring" their cash transactions with banks and other financial institutions (we shall, to simplify discussion, call all such institutions "banks") in such a way as to prevent the banks from filing currency transaction reports. The judge sentenced each of them to twelve months in prison.

Sometime before November 5, 1987, the Davenports obtained possession of some $100,000 in cash — how, we do not know. Between November 5 and November 19 they made ten separate cash deposits, each of less than $10,000, totaling $81,500, in multiple branches of two banks in which they had accounts. Banks must report to the Internal Revenue Service any cash deposit above $10,000, and if multiple deposits are made on the same day must aggregate them to determine whether the $10,000 threshold has been crossed. Several of the Davenports' deposits were made in one bank — albeit different branches — on the same day, and therefore crossed the threshold. These deposits were duly reported to the Internal Revenue Service, which sent an agent to question the Davenports. Mrs.

Davenport, after being warned that she had a right to remain silent and that anything she said could be used against her, told the agent that the deposits were part of a $100,000 inheritance that her husband had received from his father, who had died three months before the deposits were made. She readily admitted that the, or at least one, purpose of making separate deposits had been to avoid triggering the banks' obligation to report a cash transaction to the Internal Revenue Service. She was herself a bank teller and before making the deposits had inquired about the bank's practice with regard to reporting cash transactions. Mr. Davenport, when questioned (and similarly warned), repeated his wife's story about the inheritance. But whereas she had claimed that he had received the inheritance by check (and then cashed it before being deposited? How very unlikely!) he claimed that the inheritance had been discovered, in the form of cash, in a safe at the house where his father was living at the time of his death. Yet at trial there was evidence that the father had spent the last six months of his life living in a car, had died in poverty, had been buried at public expense, and, as far as anyone knew, had left no inheritance. And nineteen months before the deposits at issue in this case the Davenports had made two other large cash deposits, of $9,000 and of $16,000, on the same day. Mr. Davenport also told the agent that he still had some of the cash from the "inheritance" in the trunk of his car.

[1.2] The indictment was in twelve counts, and the first issue on appeal is whether this multiplication of counts was proper. Count one charged a conspiracy to violate section 5324(3) and count two charged a violation of the statute itself, a violation consisting of the making of the ten deposits, viewed as an effort to "structure" an $81,500 transaction. The only problem with these two counts is that the Davenports were trying to structure a transaction of $100,000, not $81,500. They just hadn't deposited the last $18,500 when they were caught. But that is a detail of no significance.

The last ten counts charge each of the ten deposits as a

separate violation of the statute. These counts should have been thrown out. The statute does not forbid the making of deposits. It forbids the structuring of a transaction. The Davenports received $100,000 in cash, which they wanted to deposit. The receipt and deposit of the $100,000 were the transaction that the Davenports structured by breaking it up into multiple deposits, of which ten had been made when they were caught. There was one structuring, one violation. The government's position leads to the weird result that if a defendant receives $10,000 and splits it up into 100 deposits he is ten times guiltier than a defendant who splits up the same amount into ten deposits. It could, we suppose, be argued — though the government does not in fact argue — that the more deposits a defendant makes, the smaller each one is likely to be, and that the smaller the individual deposit the less likely the bank is to aggregate them. But against this it can be argued with equal plausibility that a proliferation of deposits increases the probability of apprehension and punishment, by creating a thicker paper trail and reinforcing an inference of evil intent. Unable as we are to say that a defendant's conduct is more dangerous the greater the number of deposits, we are unable to construct any rationale for the government's position.

We can find no case in which the issue of the unit of violation of section 5324(3) has been dicussed; but our impression is that until this case the practice was to charge a single count of structuring. *United States v. Scanion*, 900 F.2d 485, 487 (2d Cir. 1990). We conclude that the structuring itself, and not the individual deposit, is the unit of crime.

[3] Although the judge imposed concurrent sentences, our practice in vacating a conviction underlying a concurrent sentence is to remand for resentencing on the valid counts. The idea behind the practice is that the judge may have sentenced the defendant more heavily on those counts thinking erroneously that he was guilty of additional crimes. *United States v. Boulahanis*, 677 F.2d 586, 591 (7th Cir. 1981). Whether the practice makes sense in the age of the Sentencing Guide-

lines may be questioned, but need not be decided here since the judge made clear that the sentences on the first two counts were independent of the sentences on the remaining ten counts, which she viewed as an alternative way of conceptualizing the defendants' offenses rather than as additional crimes committed by them.

[4] But all this assumes that the convictions on counts one and two are valid, and this issue we must now examine. The Davenports' opening shot is that they committed no offense because they avoided, rather than evaded, the reporting requirement. Evaluating this argument requires a closer look at the statute. It provides that "no person shall for the purpose of evading the reporting requirement of section 5313(a) [of Title 31] with respect to such transaction — (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a) . . . [or] (3) structure . . . any transaction with one or more domestic financial institutions." 31 U.S.C. §5324. Section 5313(a) in turn requires banks and the other covered financial institutions to comply with such reporting requirements for cash transactions as the Secretary of the Treasury shall establish. In November 1987, as today, the Secretary's regulations, in addition to the basic requirement that banks report any cash transaction (usually a deposit) in excess of $10,000, only required a bank to aggregate the cash deposits made by a person "during any one business day," for purposes of determining whether the $10,000 threshold had been crossed. 31 C.F.R. §103.22(a)(1). Except for the slip up in which the Davenports made deposits in a bank and its branches on the same day, the banks were not required to file currency transaction reports. From this the Davenports infer that they were not (except for that embarrassing slip) evading the reporting requirement, but merely avoiding it. They draw an analogy to the distinction between tax avoidance ("tax planning" is the euphemism), which is lawful, and tax evasion, which is not. They point out that it was not till later that a regulation was added stating that "the transaction or transactions need not exceed the $10,000 reporting threshold at any

single financial institution on any single day in order to constitute structuring." 31 C.F.R. §103.11(p); *Amendment to the Bank Secrecy Act Regulations Relating to Domestic Currency Transactions*, 54 Fed.Reg. 3023 (Jan. 23, 1989).

They misunderstand section 5324(3), the specific provision under which they were charged. It is not a statute for punishing the cash depositor as an aider and abettor of a bank's violation of the reporting requirement. The target of the statute was not banks, or cash transactors viewed as the accomplices of banks in violating the requirements that the Treasury Department imposes on banks. The target was the transactors — the "money launderers," a term we use broadly to denote persons desiring to convert "hot," suspiciously large, or easily traced cash sums into more discreet media of exchange — themselves. The statute's aim was to prevent people from either causing the (usually innocent) bank to fail to file a required report or defeating the goal of the requirement that large cash deposits be reported to the Internal Revenue Service by breaking their cash hoard into enough separate deposits to avoid activating the requirement. S.Rep. No. 433, 99th Cong., 2d Sess. 22 (1986); *United States v. Scanio*, *supra*, 900 F.2d at 488. The first subsection of the statute strikes at the first abuse and might have been violated by the Davenports' splitting up a deposit of $10,000 or more between branches of the same bank — an attempt to cause the bank not to file a required report. The third subsection strikes at the dominant form of the Davenports' misconduct by forbidding the breaking up of the transaction (here the deposit of $100,000 in cash) into small enough pieces not to trigger the requirement. Far from authorizing the Davenports' conduct, the one-day regulation facilitated it, by giving them what they thought was a safe haven: if they avoided multiple deposits on the same day (which they didn't quite, and so their scheme failed), the banks would not report their deposits and they would have succeeded in concealing the transaction from the Internal Revenue Service. It was to defeat such tactics, fairly described as evasive, that subsection (3) was added to the statute. The Davenports read it

out of the statute by arguing that they cannot be guilty if the bank was not required to file a report. They thereby contract the statute to its first subsection.

Tax avoidance is lawful; money laundering is not. The "evading" of which section 5324(3) speaks is the attempt to split up a cash hoard in such a way as to defeat the government's efforts to identify money launderers. The Davenports are not people trying to minimize their taxes by finding such loopholes as the law allows. They are people who are trying to conceal the existence of a large amount of cash from the government.

[5.6] The Davenports argue that the statute was unconstitutionally vague until the Treasury added a definition of "structuring" to its regulations (after they committed their crimes). The word "structuring" is one of those vague modern words like "conceptual" and "implicate" (in the sense in which this case might be said to "implicate" the concern with vague statutes) that lack precise meaning and are used mainly to impress; but here the statutory context gives the term an exact meaning. When read together with subsection (1) and the basic requirement of evasion, "structur[ing] any transaction" means altering the form of the transaction in order to avoid activating the bank's duty to file a currency transaction report. The government concedes, moreover, that the statute requires it to prove that a defendant knew the reporting requirements and was deliberately seeking to evade them by multiple deposits (or withdrawals). It is difficult to see how a statute that requires such knowledge as a predicate for conviction could be unconstitutionally vague. *Screws v. United States*, 325 U.S. 91, 104, 65 S.Ct. 1031, 1036, 89 L.Ed. 1495 (1945) (plurality opinion); cf. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982), since the defendant who because of its vagueness did not understand what the statute meant would not have the requisite knowledge and therefore could not be convicted. To insist on too much precision would merely open up a new set of loopholes.

[7] The defendants complain about the admission of the statements that they made to the agents, particularly the statements that cast doubt on their story that the $100,000 was an inheritance, including such evasive statements (or nonstatements) as Mrs. Davenport's refusal to give the agent the name of her husband's father. The Davenports say it is irrelevant to their guilt of the crime of which they were charged where they got the money. It is not irrelevant. The shadier the source, the greater the Davenports' motive to conceal the money from the authorities by taking measures to thwart the reporting requirements. If it really had been an inheritance, they would have had no incentive to conceal it from the Internal Revenue Service, since it was too small to create any estate tax liability. True, this assumes that the alleged bequest to Mr. Davenport was the entire estate — and there might have been other bequests, in which event the estate might have been large enough to owe estate tax, and such tax would be chargeable against the beneficiaries, who might all decide to try to structure the bequests (if they were large, and in cash) to avoid reporting by the banks and thereby beat the estate tax. But these speculations really do carry us into cloudcuckooland.

If, however, the cash was stolen, the Davenports would have every incentive to conceal it, if only because stolen money is taxable income. So the fishiness of the inheritance story was circumstantial evidence that the structuring was done with the evasive purpose that the statute requires for liability.

[8] But the Davenports say that the admission of their statements, even if proper under Fed.R.Evid. 404(b) to show intent (as we think it was), violated their constitutional rights (1) not to be forced to incriminate themselves and (2) not to be enticed into doing so by being promised that they could keep silent, implying that silence — illustrated by Mrs. Davenport's refusal to name her father-in-law — would not be used against them. The first right is the famous right against compulsory self-incrimination, the second a right that the Supreme Court has found implied in the due process clause in such cases as

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and *Greer v. Miller*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987).

[9, 10] 1. The Davenports were told that they didn't have to answer the agent's questions. As they were not in custody, there was no implicit threat if they kept mum. They decided to answer the agent's questions, no doubt hoping that they could satisfy him and ward off further investigation. As an original matter, we would incline to the view that once they started down this path of self-exculpation, any statement they made — including "I won't tell you" — was fair game. It is true that in *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987), we held that it violates the self-incrimination clause to allow into evidence testimony that the defendant refused to give a statement to the police when first approached by them. As in this case, there was no implicit threat based on a custodial situation. On the other hand the defendant had not started down the self-exculpation road. The defendants in this case did start down that road, which therefore brings it closer to the cases that forbid the claim of privilege if to accept it "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." *Rogers v. United States*, 340 U.S. 367, 371, 71 S.Ct. 438, 441, 95 L.Ed. 344 (1951). See also *Klein v. Harris*, 667 F.2d 274, 287-88 (7th Cir. 1981). From these cases grows the principle that a witness who makes an incriminating statement cannot use the privilege against compulsory self-incrimination to block cross-examination by claiming that his answers to the cross-examining lawyer's questions may incriminate him. *Brown v. United States*, 356 U.S. 148, 155-56, 78 S.Ct. 622, 626-27, 2 L.Ed.2d 589 (1958); *United States v. Herrera-Medina*, 853 F.2d 564, 567-68 (7th Cir. 1988). This case is different because the Davenports were not witnesses when questioned; nor did they seek to place the self-serving parts of their statements in evidence — in fact neither defendant took the stand. But the underlying principle could be thought the same. The privilege against self-incrimination is not a privilege to attempt to gain an advantage in the crimi-

nal process, whether in its investigatory or its trial stage, by selective disclosure followed by a clamming up. Having voluntarily given the agent their version of the events, the Davenports forfeited their privilege not to answer questions concerning that version.

We are given pause, however, by the sharp distinction that the Supreme Court drew in *Miranda v. Arizona*, 384 U.S. 436, 476 n. 45, 86 S.Ct. 1602, 1629 n. 45, 16 L.Ed.2d 694 (1966), between the situation of a witness (*Rogers*) and that of a person undergoing interrogation. The Court thought the former a far likelier setting for an attempt by the person being questioned to make self-serving statements. And it is true that the Davenports' statements, to the extent exculpatory, would not have been admissible at their trial; they would have been hearsay statements not coming within any of the exceptions to the hearsay rule. Still, the Davenports were seeking an advantage from selective disclosure — they were trying to get the Internal Revenue Service to end its investigation. It is true that *Miranda* holds that it is not a waiver of constitutional privilege for a person who is in custody to begin answering questions and then clam up. *Id.* at 475-76, 86 S.Ct. at 1628-29. See also *Rowan v. Owens*, 752 F.2d 1186, 1190 (7th Cir. 1984). But the Court's emphasis was on the coercive characteristics of custodial interrogation. The Davenports were not in custody when they were questioned.

[11-13] 2. What about the questions the Davenports *didn't* answer, such as the question asked Mrs. Davenport what her father-in-law's name was? The agent did not compel her to answer. But at trial the prosecution used her refusal to answer against her. Did the government by doing so break the agent's promise that she didn't have to answer his questions, implying that her silence would not be a subject of comment at trial? If she had said she wouldn't answer his questions, that would have been the end of it; and having told her that she didn't have to answer his questions, the agent could not have commented on her silence at the trial. But had she a privilege to weave a

tapestry of evasions? Or, once she began answering questions about the offense, was it too late to rewind the tape? The agent had not said, "If you answer my questions and when you're through repent your decision to talk to me, I won't testify about our conversation." He gave her the option not to answer his questions and it is arguable that when she declined it, all bets were off; that no understanding was violated when he testified to the full range of her answers, including refusals to answer. Cf. *Phelps v. Duckworth*, 772 F.2d 1410, 1412-13 (7th Cir. 1985) (en banc).

The analysis is thus similar to that under point (1), which means that it suffers from the same doubts induced by *Miranda*. We do not think those doubts fatal; outside the coercive setting of a custodial interrogation, willingness to answer some questions can properly be given greater weight in deciding whether that willingness should forfeit the right to object to comment on a refusal to answer a particular question. But if this is all wrong and there was error here, it was harmless beyond a reasonable doubt, as we are authorized though not required to notice notwithstanding the government's failure to argue the point. *United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (per curiam). No rational jury could have acquitted either defendant even if the jury believed the story about the inheritance. Long before they clammed up, the Davenports admitted that they had acted with the intention of preventing the filing of currency transaction reports.

The judgment is modified to vacate counts three through twelve of the indictment and the convictions and sentences based on those counts, and as modified is affirmed.

MODIFIED AND AFFIRMED.

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

31 U.S.C. 5313

§5313. Reports on domestic coins and currency transactions

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

31 U.S.C. 5322

§5322. Criminal penalties

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be

fined not more than $250,000, or imprisonment not more than five years, or both.

31 U.S.C. 5324

§5324. Structuring transactions to evade reporting requirement prohibited

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction —

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under Section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 C.F.R. 103.11 (7-1-89 Edition, new language)

§103.11 Meaning of terms.

* * * *

(n) Structure (structuring). For purposes of section 103.53, a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under section 103.22 of this Part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The transaction or transac-

tions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

* * * *

31 C.F.R. 103.22 (7-1-86 Edition)

§103.22 Reports of currency transactions.

(a) (1) Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

31 C.F.R. 103.22 (7-1-87 Edition)

§103.22 Reports of currency transactions.

(a)(1) Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

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DEC 16 1991
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(2)

Nos. 91-644 and 91-6097

In the Supreme Court of the United States

OCTOBER TERM, 1991

RONALD L. DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

BETTY L. DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether "structuring" cash bank deposits in amounts of less than $10,000 with the purpose of preventing a bank from filing the currency transaction report required for deposits of $10,000 or more violates the money laundering statute, 31 U.S.C. 5324(3).

2. Whether 31 U.S.C. 5324(3) is unconstitutionally vague.

3. Whether it is a defense to a structuring charge under 31 U.S.C. 5324(3) that the defendant did not know that structuring cash bank deposits to prevent a bank from filing a currency transaction reporting form was a crime.

4. Whether petitioners' explanations of where they obtained the cash used in the structured deposits were admissible.

5. Whether petitioners' selective refusal to answer questions in non-custodial interviews with an IRS agent was admissible against them, when they had been advised prior to the interview that they did not have to answer questions but that their answers could be used against them.

6. Whether the court of appeals erred in holding that any error in admitting petitioners' selective refusal to answer certain questions asked by the IRS agent was harmless beyond a reasonable doubt.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

American Surety Co. v. *Sullivan*, 7 F.2d 605 (2d Cir. 1925)	13
Anderson v. *Charles*, 447 U.S. 404 (1980)	16
Barlow v. *United States*, 32 U.S. (7 Pet.) 404 (1833)	12
Cheek v. *United States*, 111 S. Ct. 604 (1991)	12, 13
Doyle v. *Ohio*, 426 U.S. 610 (1976)	16
Huddleston v. *United States*, 485 U.S. 681 (1988)	14
Jenkins v. *Anderson*, 447 U.S. 231 (1980)	15
Johnson v. *United States*, 318 U.S. 189 (1943)	16
Lambert v. *California*, 355 U.S. 225 (1957)	12
Liparota v. *United States*, 471 U.S. 419 (1985)	12, 13
Miranda v. *Arizona*, 384 U.S. 436 (1966)	8
Reynolds v. *United States*, 98 U.S. 145 (1978)	12
Shevlin-Carpenter Co. v. *Minnesota*, 218 U.S. 57 (1910)	12
United States v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985)	9
United States v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985)	10
United States v. *Dashney*, 937 F.2d 532 (10th Cir. 1991)	11, 14
United States v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986)	9
United States v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986)	9
United States v. *Hoyland*, 903 F.2d 1288 (9th Cir. 1990)	11

Cases—Continued: Page

United States v. *Larson*, 796 F.2d 244 (8th Cir. 1986) 9
United States v. *Scanio*, 900 F.2d 485 (2d Cir. 1990) 11
United States v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820) 12
United States v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983) 10
United States v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) 9
Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 11
Wainwright v. *Greenfield*, 474 U.S. 284 (1986) 16

Constitution, statutes, regulation and rule:

U.S. Const. Amend. V 15
Due Process Clause 15
Self Incrimination Clause 15
18 U.S.C. 371 5
31 U.S.C. 5313(a) 2
31 U.S.C. 5322 ..... 4, 12
31 U.S.C. 5324 ..... 11, 12
31 U.S.C. 5324(1) 6, 7
31 U.S.C. 5324(3) 2, 4, 5, 7, 9, 10, 11
31 C.F.R. 103.22(a)(1) (1987) 3
Fed. R. Evid. 404(b) 14

Miscellaneous:

O. Holmes, *The Common Law* (1881) 12-13
H.R. Rep. No. 746, 99th Cong., 2d Sess. (1986) 10
S. Rep. No. 433, 99th Cong., 2d Sess. (1986) 10

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-644

RONALD L. DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 91-6097

BETTY L. DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals' opinion (Pet. App. A5-A18)[1] is reported at 929 F.2d 1169.

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[1] The two petitions in this case are almost identical. All citations to the petition and appendix are to No. 91-644.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1991. A petition for rehearing was denied on September 5, 1991 (Pet. App. A1-A2). The petition for a writ of certiorari in No. 91-6097 was filed on October 15, 1991. The petition for a writ of certiorari in No. 91-644 was filed on October 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States Distirct Court for the Southern District of Indiana, petitioners were each convicted on 11 counts of structuring cash transactions, in violation of 31 U.S.C. 5324(3), and one count of conspiracy to do so. Petitioners were sentenced to concurrent terms of 12 months' imprisonment on each count. As to each petitioner, the court of appeals affirmed the conspiracy conviction and one of the substantive convictions, but vacated the ten other substantive convictions.

1. Sometime before November 5, 1987, petitioners Ronald L. and Betty L. Davenport obtained $100,000 from an undetermined source. Between November 5 and November 19, they made ten separate cash deposits in multiple branches of two banks in which they had accounts. Each of the deposits was less than $10,000 in amount, and the total amount deposited was $81,500. Under 31 U.S.C. 5313(a) and regulations issued thereunder, banks must report to the Internal Revenue Service any cash deposit of $10,000 or more. Those regulations, at the time of petitioners' deposits and today, specify that if multiple deposits are made on the same day, the bank must aggregate them to determine whether the $10,000 thres-

hold has been crossed. 31 C.F.R. 103.22(a)(1) (1987). Several of petitioners' deposits were made at different branches of the same bank on the same day, resulting in a total deposit of more than $10,000 in a single bank on a single day. Those deposits were duly reported to the IRS by the bank. Pet. App. A9-A10.

An IRS agent was assigned to investigate petitioners' patterns of deposits. Before interviewing Betty Davenport—in a non-custodial setting—the agent advised her that he could not compel her to answer any questions, but "that anything which you say and any documents you submit may be used against you in any criminal proceeding which may be undertaken." [2] The agent then asked her whether she understood that advice and whether she wished to be interviewed. She indicated that she did. 2 Tr. 84. In response to the agent's questions, she stated that the deposits were part of a $100,000 inheritance that her husband had received from his father, who had died three months before the deposits were made. She said that

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[2] The complete text of the agent's warning to her is as follows (2 Tr. 83):

> As a special agent one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws and related offenses. In connection with my investigation I would like to ask * * * you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any documents you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of any attorney before responding.

the inheritance had been received by check and that the check had been cashed. She admitted that one purpose of making separate deposits was to avoid triggering the banks' obligation to report a cash transaction exceeding $10,000 to the IRS. Interspersed with those responses, however, she refused to tell the agent the name of her husband's father and refused to name the bank where the inheritance check had been cashed. Pet. App. A9-A10; 2 Tr. 93-98.

Mr. Davenport, when questioned and similarly advised that he did not have to answer the agent's questions, repeated his wife's explanation about the inheritance. But whereas she claimed that the inheritance was received in the form of a check that was cashed before making the deposits, he claimed that the inheritance had been in the form of cash, discovered in a safe in the house where his father lived at the time of his death. He also stated that he still had some of the cash from the inheritance in the trunk of his car. Like his wife, however, he selectively refused to answer certain of the agent's questions, including questions about the address of the house where the safe was located and the name of the women who allegedly had been living with Ronald Davenport's father at the time of his death. Pet. App. A10; 2 Tr. 100-104.

2. Section 5324(3) of Title 31 provides that no person, "for the purpose of evading [a financial institution's] reporting requirements * * * with respect to such transaction" shall "structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions." Section 5322 of the same Title provides that a "willful" violation of Section 5324(3) is a criminal offense. The first count of the 12-count

indictment charged petitioners with conspiracy to violate 31 U.S.C. 5324(3), in violation of 18 U.S.C. 371. The second count charged that petitioners' conduct in making ten deposits of less than $10,000 constituted "structuring," and violated Section 5324(3). Each of the remaining ten counts charged a single deposit as a separate violation of that statute. Pet. App. A10.

At trial, the IRS agent testified concerning petitioners' statements in the interviews, including their refusal to answer questions concerning some of the details of the supposed inheritance from Ronald Davenport's father. In addition, the government introduced evidence showing that Ronald Davenport's father spent the last six months of his life living in a car, had died in poverty, was buried at public expense, and left no known inheritance. The government also introduced evidence that Betty Davenport was a bank teller, and that before making the deposits she had inquired about the bank's practice with regard to reporting cash transactions. Pet. App. A10.

3. The court of appeals affirmed petitioners' conspiracy convictions. With respect to the substantive counts, however, the court held that the unit of prosecution under Section 5324 was the structuring of a transaction, not the making of individual cash deposits. The court thus affirmed petitioners' convictions on the single count that charged all ten deposits as a violation of the statute, but reversed petitioners' convictions on those counts that each charged an individual deposit as a violation. Pet. App. A10-A12.

a. Petitioners argued to the court of appeals that they had committed no offense. According to petitioners, because they succeeded for the most part in depositing less than $10,000 each day into any one bank, the banks incurred no obligation to report the trans-

actions under the then-existing regulations. To be sure, they did in fact trigger the reporting requirement when they made several under-$10,000 deposits in different branches of the same bank on the same day. Their position at trial, however, was that those multiple deposits were due to an oversight. Their intention, which they were largely successful in carrying out, was to avoid triggering the reporting requirements. Pet. App. A12. Thus, they argued, they sought to "avoid" the reporting requirement, rather than "evade" it.

The court of appeals rejected petitioners' contention. The court noted that under petitioners' argument, they may not have sought to violate 31 U.S.C. 5324(1), which makes it an offense to "cause or attempt to cause a domestic financial institution to fail to file a [currency transaction] report." Insofar as they had kept any bank from incurring a reporting obligation, their structuring of the transaction had eliminated their liability under that provision, which focuses on aiding and abetting the bank's violation of the reporting requirement. Petitioners, however, were prosecuted for violating 31 U.S.C. 5324(3), which makes it an offense to "structure * * * any transaction with one or more domestic financial institutions" for "the purpose of evading the reporting requirements." That provision does not impose aiding and abetting liability on money launderers that is derivative of a bank's failure to file a required report. Instead, its aim is "to prevent people from * * * defeating the goal of the requirement that large cash deposits be reported to the Internal Revenue Service by breaking their cash hoard into enough separate deposits to avoid activating the requirement." Pet. App. A13. Thus, petitioners' success in avoiding trig-

gering the banks' reporting obligations provided no reason to believe that petitioners had not violated Section 5324(3). The court rejected petitioners' attempt to analogize their conduct to tax avoidance: "Tax avoidance is lawful; money laundering is not." Pet. App. A14.

The court of appeals also rejected petitioners' contention that 31 U.S.C. 5324(3) was unconstitutionally vague at the time of petitioners' violation, which occurred before the Treasury Department had promulgated a definition of "structuring" in its regulations. The court ruled that the statutory context gave the term a precise meaning. "When read together with subsection (1) and the basic requirement of evasion, 'structur[ing] any transaction' means altering the form of the transaction in order to avoid activating the bank's duty to file a currency transaction report." Pet. App. A14. In light of the government's concession that the statute requires it to prove that a defendant knew of the reporting requirements and was deliberately seeking to evade them by making multiple deposits, the court held that the statute was not unconstitutionally vague. Any defendant who did not know of the bank's reporting requirements, the court explained, would not have the requisite knowledge and could not be convicted. *Ibid.*

b. The court of appeals rejected petitioners' contentions relating to the admission of their statements to the IRS agent. First, the court rejected their claim that their account of how they got the money was irrelevant to the structuring charge. The court reasoned that "[t]he shadier the source [of the cash], the greater [petitioners'] motive to conceal the money from the authorities by taking measures to thwart the reporting requirements." Pet. App. A15.

Second, the court rejected petitioners' claim that the admission of their selective refusal to answer some of the IRS agent's questions violated their privilege against compulsory self-incrimination, as well as their right not to be enticed into doing so by the promise that they could refuse to answer questions. The court ruled that, once petitioners decided to answer the IRS agent's questions and "started down this path of self-exculpation, any statement they made—including 'I won't tell you'—was fair game." Pet. App. A16. While a person in custodial interrogation can begin to answer questions and then invoke his right to refuse to answer under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the court of appeals distinguished this case because petitioners were not subjected to custodial interrogation. The IRS agent's statement that petitioners could elect not to answer his questions had merely offered petitioners the option to remain silent altogether; the agent did not promise that if they decided to answer his questions, he would refrain from testifying to their full range of responses, including their selective refusal to answer. Pet. App. A16-A18.

Finally, the court of appeals ruled that, even if it was error to admit petitioners' refusal to answer certain questions, the error was harmless beyond a reasonable doubt. "No rational jury could have acquitted either defendant even if the jury believed the story about the inheritance. Long before they clammed up, [petitioners] admitted that they had acted with the intention of preventing the filing of currency transaction reports." Pet. App. A18.

4. Five judges voted to grant the petition for rehearing en banc. Chief Judge Bauer, joined by Judge Ripple, wrote an opinion dissenting from the denial of rehearing en banc and expressing the view that it

was improper to admit petitioners' refusal to answer certain of the agent's questions. Pet. App. A2-A3.

ARGUMENT

1. Petitioners argue (Pet. 14-16) that the court of appeals erred when it interpreted Section 5324(3) to apply to their attempt to "avoid" triggering any bank's reporting obligation. In their view, Section 5423(3) applies only where the structurer's purpose was to prevent the bank from recognizing and complying with an existing reporting requirement, not where the structurer's purpose was to avoid triggering a reporting requirement altogether.

Prior to the enactment of 31 U.S.C. 5324, the courts of appeals were divided over whether a depositor who "structured" cash bank deposits—*i.e.*, divided up the deposits so as not to trigger a bank's reporting obligations—could be criminally liable as an accessory for the bank's failure to report the cash transaction. Several courts rejected attempts to impose criminal liability on depositors who structured their deposits, reasoning that accessory liability could not be grounded in circumstances where the financial institution was not obligated (because of the structuring) to file a currency transaction report or because the statute then in force did not provide depositors with fair warning that structuring was illegal. See, *e.g.*, *United States* v. *Larson*, 796 F.2d 244, 246-247 (8th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758, 760-763 (9th Cir. 1986); *United States* v. *Denemark*, 779 F.2d 1559, 1561-1564 (11th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676, 679-683 (1st Cir. 1985). Other courts of appeals affirmed structuring convictions on an accessory-liability or similar theory. See, *e.g.*, *United States* v. *Heyman*, 794 F.2d 788, 790-793 (2d Cir.) (aider and abettor and conspiracy li-

ability), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311, 1314-1316 (10th Cir. 1984) (aider and abettor liabiilty), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1096-1101 (11th Cir. 1983) (aider and abettor liability).

Section 5324(3) was enacted to resolve that conflict. The Senate Report explained that the new provision "would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel*, and *Denemark*." Furthermore, the new provision "would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act." S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986); see also H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-20 (1986).

The court of appeals in this case was correct in concluding that Section 5324(3) criminalized attempts to avoid triggering any bank's reporting requirement by structuring cash deposits, *i.e.*, breaking down the deposits into amounts less than $10,000. The term "structuring" had an established meaning from the case law to which Congress specifically referred in enacting Section 5324(3). As the court of appeals reasoned, petitioners' reading, under which "structuring" for the purpose of avoiding triggering any bank's reporting requirement would not be within the reach of Section 5324(3), would have the effect of reading Section 5324(3) entirely out of the statute. Pet. App. A13-A14.

There is no conflict among the courts of appeals concerning the interpretation of Section 5324(3), and petitioners do not suggest that one exists. Every court of appeals that has considered the question has agreed with the Seventh Circuit's interpretation in

this case. See *United States* v. *Dashney*, 937 F.2d 532, 537-540 (10th Cir. 1991), cert. denied, 112 S. Ct. 402 (1991); *United States* v. *Hoyland*, 903 F.2d 1288, 1289-1292 (9th Cir. 1990); *United States* v. *Scanio*, 900 F.2d 485, 490-491 (2d Cir. 1990).

2. Petitioners argue (Pet. 16-17) that the court of appeals' interpretation of Section 5324(3) renders it unconstitutionally vague.

As an initial matter, petitioners lack standing to argue that Section 5324(3) is unconstitutionally vague in some of its potential applications, since it is clear that the statute proscribes the structuring of deposits that petitioners engaged in. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 (1982) ("[A]ssuming the enactment implicates no constitutionally protected conduct, * * * [a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). Moreover, there is nothing ambiguous or vague about the scope of Section 5324. The term "structuring" developed a definite meaning in the case law that preceded the enactment of the provision, and the common meaning of the phrase "evading the reporting requirements" gives adequate notice that petitioners' conduct was proscribed. Finally, the requirement that the structurer know that the bank has a reporting obligation that is triggered by large cash deposits, *i.e.*, the requirement that the structurer act "willfully" to evade the reporting requirement, mitigates any uncertainty in the language of the statute. See *Hoffman Estates*, 455 U.S. at 499. The only other court of appeals to consider the question likewise has rejected a vagueness challenge to Section 5324. See *United States* v. *Hoyland*, *supra*.

3. Petitioners argue (Pet. 3-14) that they were convicted despite their claims that they mistakenly thought their actions were lawful, and that this Court's decision in *Cheek* v. *United States*, 111 S. Ct. 604 (1991), therefore requires reversal.[3] They point out that 31 U.S.C. 5322 provides that a violation of Section 5324 is a criminal offense only if committed "willfully," and they argue that their conduct was not "willful" unless they knew that it was against the law. They concede (Pet. 4) that they intended to structure the deposits to avoid triggering the banks' reporting obligation, but claim that they believed that such conduct was not a violation of the statute.

It has long been settled that ignorance of the law does not excuse its violation. As this Court's opinion in *Cheek* recognized, that rule "is deeply rooted in the American legal system." 111 S. Ct. at 609 (citing *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 182 (1820) (Livingston, J., dissenting); *Barlow* v. *United States*, 32 U.S. (7 Pet.) 404, 411 (1833); *Reynolds* v. *United States*, 98 U.S. 145, 167 (1878); *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 68 (1910); *Lambert* v. *California*, 355 U.S. 225, 228 (1957); *Liparota* v. *United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting); O. Holmes, *The Com-*

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[3] There was plainly sufficient evidence from which a reasonable jury could have found that petitioners believed their conduct to be unlawful; their false story about the inheritance alone would have provided a basis for such a finding. However, the jury was instructed that, although the government had to prove "that the defendant knew of the transaction reporting requirements and voluntarily and intentionally structured transactions to avoid the reporting requirement," the government was "not required to prove that the defendant knew that structuring transactions was illegal." See 3 Tr. 183.

mon Law 47-48 (1881)). "The word 'wilfull,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." *American Surety Co.* v. *Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.); see also *Liparota*, 471 U.S. at 425 n.9.

Nothing in *Cheek* altered that general rule, as applied to non-tax cases. Instead, *Cheek* reaffirmed a series of decisions in which the Court had recognized that Congress intended "an exception to the traditional rule," 111 S. Ct. at 609, applicable to criminal tax offenses. Due to "the complexity of the tax laws," *ibid.*, the government must prove that the defendant engaged in "the voluntary, intentional violation of a known legal duty" in order to obtain a conviction for certain criminal tax offenses. *Ibid.* In particular, the court held that, under the "special treatment of criminal tax offenses," *ibid.*, the government must negate a tax defendant's "claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." 111 S. Ct. at 610-611.

Petitioners were not prosecuted for income tax violations. As the court of appeals pointed out, petitioners "are not people trying to minimize their taxes by finding such loopholes as the law allows," but are instead "trying to conceal the existence of a large amount of cash from the government." Pet. App. A14. The language and legislative history of Section 5324(3) demonstrate that Congress intended to create no special state-of-mind requirements for that statute. So long as petitioners acted "willfully" in the ordinary sense of that term—*i.e.*, they intended to

structure their deposits to avoid triggering the reporting requirement—they acted with the intent specified for violation of the statute. Only one other court of appeals has expressly considered the application of *Cheek* to structuring cases, and that court, like this one, has held that *Cheek* "involves only certain criminal tax statutes, and we see no reason to extend similar statutory interpretation into the straightforward currency reporting requirements." *Dashney*, 937 F.2d at 540.

4. Petitioners reassert (Pet. 17-20) their claim that the trial court erred in admitting evidence respecting the source of the cash used in the structuring. Petitioners mischaracterize the court of appeals' opinion as holding that the evidence was admissible to show that the money was stolen, and petitioners claim that that "bad act" was not proved by a preponderance of the evidence, as required by *Huddleston* v. *United States*, 485 U.S. 681 (1988). Contrary to petitioners' interpretation, however, the evidence of the source of the funds was admitted not to show a specific bad act in the acquisition of the funds, but rather to shed light on the motive for dividing up the cash into deposits of less than $10,000. If, as the evidence showed, the cash had a source that petitioners sought to conceal (by concocting the inheritance story), then that made it more likely that the purpose of the structuring was to evade the banks' reporting requirements and thereby prevent the IRS from learning about the money. The "bad act" admitted under Rule 404(b) was petitioners' effort to conceal the source of the cash, which occurred during their discussions with the IRS agent. As to that "bad act," there was never any question that the conversations with the agent occurred substantially as the agent recounted them.

5. Petitioners argue (Pet. 20-26) that the warnings given by the IRS agent implied that their selective refusal to answer certain of the agent's questions would not be used against them.

As an initial matter, despite petitioners' references to the privilege against compelled self-incrimination, that privilege was not implicated in this case. In *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), this Court held that the Fifth Amendment is not violated by the use of defendant's pre-arrest silence against him at trial. "The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and prevents the prosecution from commenting on the silence of a defendant who asserts the right." 447 U.S. at 235. The Fifth Amendment does not preclude the prosecution from using a defendant's pre-arrest silence against him, even though, as *Jenkins* recognized, this may put pressure on a defendant to speak up rather than remain silent prior to his arrest. *Id.* at 236-237.

In this case, it is undisputed that petitioners' interviews took place in a non-coercive, non-custodial setting. Thus, petitioners had no right grounded in the Self-Incrimination Clause to remain silent, and that Clause provided them with no protection against introduction of and comment upon their selective refusal to answer the agent's questions.

As the court of appeals recognized, however, the Due Process Clause could preclude admission of petitioners' refusal to answer certain of the IRS agent's questions if the representation had been made to them that they could selectively choose not to answer some of his questions and their silence would not be used against them. That is the rationale employed in a number of this Court's decisions dealing with a prosecutor's comment on the defendant's silence at trial,

or during a custodial interrogation, after the defendant had been advised that this silence would not be used against him. See *Wainwright* v. *Greenfield*, 474 U.S. 284, 291 (1986); *Doyle* v. *Ohio*, 426 U.S. 610 (1976); *Johnson* v. *United States*, 318 U.S. 189, 197 (1943).

As the court of appeals recognized, none of those decisions rested on any right of a potential defendant "to weave a tapestry of evasions," Pet. App. A17-A18, and there was thus nothing fundamentally unfair about using petitioners' highly selective refusal to answer certain questions against them. Once petitioners started down the path of presenting an exculpatory explanation to the IRS agent, any statements they made, including their selective refusal to tell the agent details that would allow him to investigate the truth of their stories, were "fair game" for use against them. Pet. App. A16. The situation is thus analogous to that in *Anderson* v. *Charles*, 447 U.S. 404, 408 (1980), which held that cross-examination respecting inconsistent post-arrest statements "makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." Likewise, in this case, petitioners' election not to answer certain of the IRS agent's questions was not because they had been "induced to remain silent" but rather because they decided that to answer would allow the agent to investigate their inheritance story.

Moreover, the court of appeals correctly determined (Pet. App. A18) that the "warnings" given by the IRS agent did not include any representation to petitioners that their selective refusal to answer certain questions would not be used against them. The record shows that petitioners were told that the agent could not coerce them to answer his questions, but they were

warned that "anything which you say and any documents you submit may be used against you." See note 2, *supra*. Once they had themselves consented to the interview—and especially in the absence of any indication during the interview that they intended to revoke that consent and assert their right to remain silent—the warning clearly informed them that "anything" that they said, including their selective refusal to answer the agent's questions, would be used against them.

6. Even if there were some doubt whether petitioners' selective refusal to answer certain questions was admissible evidence, the issue in this case would not warrant review by this Court in light of the court of appeals' holding (Pet. App. A18) that any error in that regard was harmless beyond a reasonable doubt. That is a factual determination based on the record in this case, and it presents no issue of general application.

Petitioners argue (Pet. 26-27) that the court of appeals should not have decided the harmless error question because it was not pressed by the government. The court of appeals, however, clearly has discretion to reach any issue presented by a case, even if it is not argued in the government's pleadings. The court of appeals' exercise of that discretion here does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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